No. 6038

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE BANKERS RESERVE LIFE COMPANY, a Corporation,
Appellant,

vs.

MARION E. YELLAND,
Appellee.

BRIEF OF APPELLEE

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I.

STATEMENT OF THE CASE.

(a) THE BASIC FACTS. Appellee contends that a statement of the facts of the case must be a statement of the facts found by the jury to be true in the trial of the case in the lower court and, judged by this criterion, appellant has not stated all of the material facts found by the jury to be true in its brief under the heading of "The Basic Facts." The jury found the following facts to be true: That

Louis A. Yelland, the insured and deceased husband of appellee, on November 20, 1926, signed a written application of insurance in The Bankers Reserve Life Company, appellant herein, in the County of White Pine, State of Nevada, for insurance on his life in the amount of $10,200.00 in case he died a natural death, and carrying a double indemnity clause in case he died as the result of accident. The said application was prepared and presented to said Yelland for his signature by one F. L. Hickman, the Intermountain or District Manager of the appellant company, who then and there induced said Yelland to sign the same by representing to him that his said contract of insurance would go into effect just as soon as he, Yelland, paid the first premium, provided he satisfactorily passed Dr. Rand's medical examination, the said Rand being the appellant's local medical examiner, and the said Hickman then and there accepted from Yelland his promissory note in the sum of $237.60 as full payment and settlement of the first premium of said contract of insurance, and then and there assured Yelland that the taking of his promissory note instead of cash for the first premium would make no difference, and that the insurance would go into effect at once, provided he passed the said medical examination. That Hickman at the time of taking said application positively stated to Yelland that he was the Intermountain Manager of The Bankers Reserve Life Company and had authority to bind the company by

his representations. That to induce them to take insurance in the appellant company, Hickman made substantially the same statements to Louis A. Yelland's brother, Arthur H. Yelland, and to his neighbor, Steven Doutre, at the time that Louis A. Yelland's contract of insurance was being consummated, going to show that that was his practice in soliciting insurance from the public. That Louis A. Yelland was examined by the said Dr. Rand at Ely, Nevada, on the 26th day of November, 1926, and Rand's examination showed that he was a good risk for insurance. That two days after his examination the said Yelland died as the result of accidental injuries received the previous day. That the said application and medical report did not reach appellant's home office in Omaha, Nebraska, until after the said Yelland's death, and no written policy was ever issued the said Yelland. That the said Hickman had acted as Intermountain Manager of appellant for a period of five years and during said time the company had maintained an office for him in Salt Lake City, Utah, at 601-602 Deseret Bank Building, and that during said five years the words "The Bankers Reserve Life Company, F. L. Hickman, Intermountain Manager," were on the door of said office. That the said Hickman had exclusive jurisdiction over the states of Utah, Southern Idaho and Nevada in representing appellant company and that that district was known as the Intermountain territory, over which Hickman presided as Inter-

mountain manager. That amongst Hickman's duties as Intermountain manager over said district was to appoint sub-agents. It is true that the company ratified these appointments, but Hickman says that they never questioned his selections. He also trained and supervised these sub-agents, and received a portion of the commissions on all the business they wrote. That he also collected renewal premiums at his office in Salt Lake, and got a portion of all the commissions on such renewals. That the company, appellant herein, also maintained a cashier at the Salt Lake office and paid her salary and she also acted as Hickman's secretary. That Hickman during all of the time that he was acting for the appellant as Intermountain manager used stationery upon which were the words: "The Bankers Reserve Life Company, F. L. Hickman, Intermountain Manager, 601-602 Deseret Bank Building, Salt Lake City, Utah," or words of similar effect, and that during all of this time he corresponded with the company with reference to the insurance business using this stationery. That the appellant recognized him as their Intermountain manager thru this stationery and correspondence. That appellant's synopsis of annual reports were published in Utah, a part of the said Intermountain District, for the years 1925, 1926 and 1927, as required by the Utah Statutes, under the caption of "F. L. Hickman, Intermountain Manager," and that appellant knew this fact, or by the exercise of reasonable dili-

gence should have known it. That at the time Hickman made Yelland's contract of insurance for appellant he distributed cards and eye-shades to the public bearing the words "The Bankers Reserve Life Company, F. L. Hickman, Intermountain Manager, 601-602 Deseret Bank Building, Salt Lake City, Utah." That Hickman during all the time he represented appellant considered himself as the Intermountain manager of appellant and the said appellant held him out to the public as such in the Intermountain District, and that Yelland negotiated his contract of insurance with Hickman as the Intermountain manager of the appellant.

From these facts the jury found for appellee on her amended complaint and appellee submits that they were justified in so finding both upon the facts and the law.

II.

BRIEF OF THE ARGUMENT.

1. Appellant contends, first, that the court erred in admitting parol testimony as to the representations of Hickman to the insured that the contract of insurance would go into effect at once provided he passed a successful medical examination, because,

(a) Said testimony tended to contradict or vary the terms of the written application signed by the insured; in other words it violated the parol evidence rule.

Appellant's whole defense is based upon the proposition so far as this part of the case is concerned, that the following condition in the application could not be waived by parol: "(2) That under no circumstances shall the insurance hereby applied for be in force until payment in cash of the first premium and delivery of the policy to the applicant in person, during his lifetime and while in good health" (Transcript, page 30), nor would the appellant be estopped by the representations of Hickman, which representations in themselves constituted a waiver of the said condition.

In considering this branch of the case, we must inquire into the nature of the application. First, it is alleged and admitted by the pleadings that the application was prepared and presented to insured by said Hickman as the representative of appellant company (Transcript, pages 4 and 15), and that the same was a printed form (Transcript, page 165). Secondly, there are no restrictions or conditions in the said application limiting the authority or power of any agent or representative of the company to make modifications, changes or alterations in the application or contract of insurance or to waive conditions and forfeitures in the contract, or to make contracts of insurance (Transcript, pages 26-29). Thirdly, we must consider the character of the parol testimony introduced by appellee and which is objected to as varying the provisions above referred to in the application. Mrs. Yelland testified that Hick-

man at the time that the application was signed stated that the contract of insurance would go into effect at once, that is, when he accepted Yelland's note for the first premium, provided he satisfactorily passed Dr. Rand's medical examination, and that he would take Yelland's note as a cash settlement for the first premium (Transcript, pages 59-60). And it is to be noted from this testimony that Yelland did not sign the application until he had received this assurance from Hickman and that the representations of Hickman were the direct inducing cause for Yelland signing the application and making out his note. This testimony is so pertinent that appellee desires to quote it: "He (Hickman) said, *'If you take it out now,' and my husband said, 'Well, I have the means to take it out, but I don't want to spend the money now; I will need it later on for shearing and sheep expenses.' And he said, 'That don't make any difference, we will take your note for it.' And Mr. Yelland asked if the policy would be in effect just the same as if he paid the cash premium, and he said, 'Yes, just the same, we take that for cash payment.' And he said, 'I have authority to state that.' And my husband said, 'Well, Mr. Hickman, have you authority to say that?' and he said, 'Yes, because I am their Intermountain manager, and they don't question any of my actions with regard to the insurance policies whatever.' And, he said, 'Well, the note—would the policy go into effect at the time you take my note?'*

And, he said, 'Yes, providing you pass Dr. Rand's examination satisfactorily.' And my husband said, 'Well, if it won't go into effect, I will wait until I can pay cash on the policy, then I will be sure of it,' and he says, 'There is no use taking it out until it goes into effect.' And he said, 'Well, it will go into effect right now, providing you pass Dr. Rand's examination. There is no question about it.' And they signed the contract." (Italics ours). These representations of Hickman were the direct inducing cause of getting Yelland's signature to the application. They did not vary or contradict the condition in the application referred to because they constituted a waiver of that condition at the time the application was signed and for appellant to contend otherwise would be a fraud upon the appellee.

Vance, in his work on insurance under the title of "Waiver and Estoppel," page 356, lays down the rule as follows:

> "It is clear that there is fraud on the part of the insurer's agent in pretending to make a valid contract when by its terms he knows it to be invalid, and that the insured, if acting in good faith, has been misled into paying money for a contract which by its terms conferred no benefit whatever upon him."

And the learned author goes on to discuss the question whether the insured can inforce such a contract in an action at law without first reforming it in equity, as follows:

"The whole contest however voluminously waged in the courts narrows itself to this single issue: Does the admission of such evidence have the effect of altering or contradicting a term of the policy and thus violating the parol evidence rule? * * * In speaking of this famous rule, Justice Miller, in *Union Mutual Life Insurance Company v. Wilkinson*, 13 Wall. 222, makes the following sound observations: 'The great value of the rule of evidence here invoked cannot be easily overestimated. As a means of protecting those who are honest, accurate and prudent in making their contracts against fraud and false swearing, against carelessness and inaccuracy, by furnishing evidence of what was intended by the parties, which can always be produced without fear of change or liability of misconstruction, the rule merits the eulogies it has received. But experience has shown that in reference to these very matters the rule is not perfect. *The written instrument does not always represent the intention of both parties and sometimes it fails to do so as to either, and where this has been the result of accident, mistake or fraud, the principle has long been recognized that under proper circumstances and in an appropriate proceeding the instrument may be set aside or reformed as best suits the purpose of justice. A rule of evidence adopted by the courts as a protection against fraud and false swearing would, as was said in regard to the analogous rule known as the 'statute of frauds,' become the instrument of the very fraud it was intended to prevent.* (Italics ours). In the case before us a paper is offered in evidence against the plaintiff containing a representation concerning a matter material to the contract on which the suit is brought and it is not denied that he signed the instrument and that the representation is un-

true. But the parol testimony makes it clear beyond a question that the party did not intend to make that representation when he signed the paper and did not know that he was doing so, and in fact had refused to make any statement upon that subject. If the writing containing this representation had been prepared and signed by the plaintiff in his application for a policy of insurance on the life of his wife, and if the representation complained of had been inserted by himself or by some one who was his agent alone in the matter, and forwarded to the principal office of the defending corporation and acted upon as true by the officers of the company, it is easy to see that justice would authorize them to hold him to the truth of the statement and that as they had no part in the mistake which he made, or in the making of the instrument which did not truly represent what he intended, he should not after the event be permitted to show his own mistake or carelessness to the prejudice of the corporation.

"If, however, we suppose the party making the insurance to have been an individual and to have been present when the application was signed, and soliciting the insured to make the contract of insurance, and that the insurer himself wrote out all these representations and was told by the plaintiff and his wife that they knew nothing at all about this particular subject of inquiry and that they refused to make any statement about it, and, yet knowing all this, wrote the representations to suit himself, it is equally clear that for the insurer to insist that the policy is void because it contains this statement, would be an act of bad faith and of the greatest injustice and dishonesty. And the reason for this is that the representation was not the statement of the plaintiff and that the de-

fendant knew that it was not when he made the contract, and that it was made by the defendant who procured plaintiff's signature thereto.

"It is in precisely such cases as this that courts of law in modern times have introduced the doctrine of equitable estoppel or as it is sometimes called estoppel in pais. The principle is that where one party by his representations or his conduct induced the other party to the transaction to give him an advantage which it would be against equity and good conscience for him to assert, he should not, in a court of justice, be permitted to avail himself of that advantage."

And the court goes on to show that the doctrine of equitable estoppel is now applied to a direct action on the contract.

Vance goes on in the following language:

"The modern decisions fully sustain this proposition and they seem to us to be founded in reason and justice and meet our entire approval. This principle does not admit parol testimony to vary or contradict that which is in writing but it goes on the idea that the writing offered in evidence was not the instrument of the party whose name is signed to it; that it was procured under such circumstances as to estop the other side from using it or relying on its contents; not that it may be contradicted by parol testimony, but that it may be shown by such testimony that it cannot be lawfully used against the party whose name is signed to it.

"It is believed that nearly all of the states have accepted the doctrine allowing parol proof of facts contemporaneous with the delivery of the policy constituting an estoppel, whereby the

> insurer is prevented from obtaining the benefit of a term of his written contract, provided that term invalidates the policy in its inception (Citing cases, page 362)."

The rule laid down by Vance, as above indicated, is clearly stated in the case of *Union Mutual Life Ins. Co. v. Wilkinson,* 13 Wall. 222, 20 L. Ed. 617. In that case an action was brought on a life insurance policy. The insurance company raised the defense that the insurance contract was void because the applicant had answered falsely certain material questions in the application which he had signed. By the terms of the policy it became void if any of these representations proved to be untrue. The defendant company objected to the introduction of parol testimony regarding the action of the agent in soliciting the application. This, according to the report, was the very first question raised by the attorneys for the insurance company in their brief just as it is here. They said the question to be discussed is: "Had the court and jury under any pretense whatever any right to take into evidence the parol statements made by the applicant or others which were contemporaneous with the signing of the application?" They go on and say: "We have this anomalous position in a court of law. The plaintiff sues on a written contract signed by himself as one of the parties. He asks a recovery according to the terms of that contract and yet in the same breath is permitted by the court to contradict and vary the terms of this written contract

by proving what was stated by himself and others at and before the signing of the same." The Supreme Court of the United States, speaking thru Justice Miller, overruled these objections in the language stated in the excerpt from Vance quoted above. The court then continues:

> "Whose agent was Ball in filling up the application? . . . It is well known, so well that no court would be justified in shutting its eyes to it, that insurance companies organized under the laws of one state and having in that state its principal business office send these agents all over the land with directions to solicit and procure applications for policies, furnishing them with printed arguments in favor of the value and the necessity of life insurance and of the special advantages of the corporation which the agent represents. They pay these agents large commissions on the premiums thus obtained and the policies are delivered at their hands to the insured. The agents are stimulated by letters and instructions to activity in procuring contracts and the party who is in this manner induced to take out a poilcy rarely sees or knows anything about the company or its officers by whom it is issued but looks to and relies upon the agent who has persuaded him to effect insurance as the full and complete representative of the company in all that is said and done in making the contract. Has he not the right so to regard him? It is quite true that the reports of judicial decisions are filled with the efforts of those companies, by their counsel, to establish the doctrine that they can do all of this and yet limit their responsibility for the acts of these agents to the simple receipt of the premiums and delivery of the policy, the argu-

> ment being that as to all the other acts of the agent he is the agent of the insured. This proposition is not without support in some of the earlier decisions on this subject, and at a time when insurance companies waited for parties to come to them to seek insurance or to forward applications on their own motion, the doctrine had a reasonable foundation to rest upon. But to apply such a doctrine in its full force to a system of selling policies thru agents which we have described would be a snare and delusion leading, as it has done in numerous cases, to the grossest frauds of which the insurance corporations received the benefits, and the parties, supposing themselves insured, are the victims. The tendency of the modern decisions in this country is steadily in the opposite direction. *The powers of the agents are, prima facie, co-extensive with the business intrusted to their care and will not be narrowed by limitations not communicated to the person with whom he deals.* (Citing cases.) *An insurance company establishing a local agency must be held responsible to the parties with whom they transact business for the acts and declarations of the agent within the scope of his employment as if they proceeded from the principal.* (Citing cases).

This case was approved in the later decisions of the Supreme Court of the United States. In the case of *American Life Insurance Company vs. Mahone*, 21 Wall. 152, 22 L. Ed. 593, it was held that parol evidence was admissible to show that the answers given by the insured to the company's agent were different than those written in the application, even tho the insured subsequently read over the answers before he signed the application.

The same rule was laid down in *N. J. Mutual Life Ins. Co. vs. Baker*, 94 U. S. 610, 24 L. Ed. 268, and *Continental Life Ins. Co. vs. Chamberlain*, 132 U. S. 304, 33 L. Ed. 341.

In the case of *Association vs. Wickham*, 141 U. S. 564, and cited with approval by the Circuit Court of Appeals of the Ninth Circuit in the case of *McElroy vs. British American Assurance Company*, 94 Fed. 990, the court said:

> "We have no disposition to overrule or qualify in any way the general rule and familiar doctrine, inforced by this court from the case of *Hunt vs. Rousmanier's Admrs.*, 8 Wheat. 174, decided in 1823, to that of *Seitz v. Refrigerator Co.* (decided at the present term), 141 U. S. 510, that parol testimony is not admissible to vary, contradict, add to or qualify the terms of a written instrument. The rule, however, is subject to numerous qualifications as well established as the general principle itself, among which are that such testimony is admissible to show the circumstances under which the instrument was executed." (Citing *Ins. Co. vs. Gray*, 43 Kas. 497, 23 Pac. 637, and other cases).
>
> "In the *McElroy* case, *supra*, the court said, speaking thru Judge Morrow: "The insured had a right to rely upon the agent performing his duty of making his contract in conformity with the information given and the agent's failure so to do, whether the result of a mistake or a deliberate fraud, cannot operate to the prejudice of the insured. The contract of insurance is pre-eminently one that should be characterized by good faith on both sides. * * *

> In *Kister vs. Insurance Company,* 128 Pa. St. 553, 18 Atl. 447, a policy was issued upon an application in which the agent had written down other answers than those given him by the applicant and the insured signed the application in ignorance of this fact. The Supreme Court said: 'A copy of this application accompanied the policy and it is argued that Kister (insured) could and ought to have read it and if he had done so he would have seen that the answers were untrue. These are considerations which were properly addressed to the jury. We cannot say that the law, in anticipation of a fraud on the part of the company, imposed any absolute duty upon Kister to read the policy when he received it, altho it would have been an act of prudence to have done so.' (Citing cases). One thing is certain, however: The company cannot repudiate the fraud of the agent and thus escape the obligations of a contract consummated thereby, merely because Kister accepted in good faith the act of the agent without examination. Plaintiff had a right to rely upon the assumption that his policy would be in accordance with the terms of his oral application. If the defendant decided to make it anything different it should, in order to make it binding upon plaintiff, under the authorities in this state, have called his attention to those clauses which differed from the oral application."

In the recent Federal case of *Campbell vs. Business Men's Assn.*, 31 Fed. (2nd) 571, and decided in May, 1928, and which was an action on a life and health insurance policy, the insurance company contended that there was a misrepresentation of fact in the application made by the insured in

this: That he had answered "No" to a question as to whether he had previously been rejected for insurance when as a matter of fact he had been rejected. It appeared as a fact in the case that the agent wrote the application and there was no limitation on his authority in the application. The court said in discussing the case:

> "The applicable and controlling rule in such cases was announced in *Union Mutual Life Ins. Co. vs. Wilkinson*, 13 Wall. 222, 20 L. Ed. 617, quoting from said decision as follows: 'Hence when these agents in soliciting insurance undertake to prepare the applications of the insured or make any representations to the assured as to the character or effect of the statements of the application they will be regarded in doing so as the agents of the insured. * * * To permit verbal testimony to show how this was done does not contradict the written contract, tho the application was signed by the party. It proceeds on the ground that it was not his statement, and that the insurance company by the acts of their agent in the matter are estopped to set up that it is the representation of the assured.' "

In the recent case of *Stipcich vs. Metropolitan Life Insurance Company*, 277 U. S. 311, 72 L. Ed. 895, and which was an Oregon case certified by the Ninth Circuit to the Supreme Court of the United States, it was held that a soliciting agent, under the Oregon statute, had authority to receive notice of a change of condition in the insured's health and notice to him was notice to the company, even tho the application provided that no disclosures about

the applicant not indicated in writing in the application would be binding on the company. The court held in this connection *that narrow and unreasonable interpretation of clauses in insurance policies are not favored.*

Before leaving the decisions of the United States and Federal courts on this branch of the case, appellee desires to briefly review the decisions of this character cited in appellant's brief as upholding its view of the law.

The first case cited by appellant is that of *Northern Assurance Company vs. Grandview Building Association*, 183 U. S. 308, 46 L. Ed. 213. The policy involved in that case *provided that the consent to other insurance must be indorsed upon the policy and limited the power of agents to waive conditions unless the waivers were made in writing and endorsed on or attached to the policy, and, the policy was delivered to the insured so that he had actual notice of the limitations upon the power of agents to make parol waivers.* In other words parol waivers were prohibited by the provisions of the policy of which insured had notice.

This case does not overrule the decision of *Union Mutual Life Ins. Company vs. Wilkinson* or the other cases cited by appellee, but distinguishes them. In this connection it said:

> "The present case is very different from *Union Mutual Life Insurance Company vs. Wilkinson*, 13 Wall. 222, 20 L. Ed. 617, and

> from *American Life Company vs. Mahone*, 21 Wall. 152, 22 L. Ed. 593. *In neither of these cases was any limitation upon the power of the agent brought to the assured.*" (Italics ours). Page 234 L. Ed.

In the case at bar there was no limitation placed upon the power of any agent of the company in the application and there was no provision against waivers by parol. Consequently our case is governed by the rule laid down in *Mutual Life Ins. Company vs. Wilkinson* rather than by the *Grand Bldg. Assn.* case.

In the case of *Thompson vs. Knickerbocker Life Ins. Co.*, 104 U. S. 252, 26 L. Ed. 765, and next cited by appellant to support its view, the Court said at the conclusion of the decision:

> "We do not accept the position that the payment of the annual premium is a condition precedent to the continuance of the policy. This is untrue. It is a condition subsequent only, the non-performance of which may incur a forfeiture of the policy or may not according to the circumstances. *It is always open to the insured to show a waiver of a condition or a course of conduct on the part of the insurer which gave him just and reasonable ground to infer that a forfeiture would not be exacted.*"

In this case the policy had been long issued and it expressly informed the insured that if the premium were not paid the policy would be forfeited. It was not the waiver of a condition precedent as in the case at bar nor of a condition that

went to the inception of the contract. The case is not at all like the case at bar on its facts.

Cooley in his Briefs on Insurance, Vol. V, page 3984, 2nd Ed., lays down the rule as follows:

> "In some jurisdictions it is held that a soliciting agent may waive conditions precedent on the theory that an agency to solicit carries with it implied authority to do everything necessary to discharge the business at hand. The general rule that the knowledge of an insurance agent is imputable to the company is applied in many jurisdictions to a soliciting agent with reference to matters made known to them prior to the execution of the policy.
>
> "This rule is no doubt based on the theory expressed in *West End Hotel and Land Company vs. American Fire Insurance Company*, 74 Fed. 114, that before the execution of the policy the powers and authority of a soliciting agent are co-extensive with the business intrusted to his care so that his positive knowledge of material facts are chargeable to the principal and the rule is undoubtedly supported by the weight of authority." (Cooley, Vol. V, page 4049).

In the case of *Union Mutual Life Ins. Co. vs. Mowry*, 96 U. S. 544, 24 L. Ed. 674, the policy expressly provided that no agent of the company except the president and the secretary could waive such forfeitures or alter that or any other condition of the policy, and of course the insured had full notice of this limitation, the policy having been delivered to him.

The case of *Merchants Mutual Insurance Company vs. Lyman*, 82 U. S. 664, 21 L. Ed. 246, is clearly not in point on its facts. In that case a written contract or policy was actually executed. There was no such situation as in our case. No written contract has ever been executed here.

The case of *Rajotte-Winters, Inc. vs. Whitney*, 2 Fed. (2nd), is good law on its facts, but not in point as to the facts in this case. In that case there was a fully executed written contract signed by the parties and of course it could not be changed by parol in the manner therein sought. Another thing, the assignment of error failed to point out the testimony offered or rejected and this was considered sufficient to ignore it.

In the case of *Connecticut Fire Ins. Company vs. Buchanan*, 141 Fed. 877, the court discussing the case of *Marston vs. Kennebec Mut. Life Ins. Co.*, at page 893, says:

> "It was there held, following *Insurance Company vs. Wilkinson* and *Continental Life Ins. Company vs. Chamberlain*, that where the application upon which the policy is issued is drawn by an unauthorized agent of the insurer and the answers to the interrogatories are written by him without fraud or collusion on the part of the applicant, the insurer is estopped from controverting the truth of those answers in an action upon the policy, the reason for the ruling being that the answers are not the statement of the applicant but of the insurer. The case, however, makes a clear distinction between admitting parol testimony

to show that the statements in the application are those of the insurer, tho an unauthorized agent, and admitting such testimony to vary a statement or stipulation of the policy itself, as in the present cases—a distinction pointed out, as before shown, in *Northern Assurance Company vs. Grand View Bldg. Association* in the observations there made respecting *Insurance Co. vs. Wilkinson.* The court goes on:

"Referring to a prior case in which parol testimony of a contemporaneous representation or assurance of the agent relating to the time in which the premium could be paid was held inadmissible, the Supreme Judicial Court of Maine states the distinction in the following language in the case cited, page 276 of 89 Maine, page 392 of 36 Atl. (56 Am. St. Rep. 412): 'But we think that case to be distinguished from the case at bar. In that case the provision in relation to the time of payment of the premium was one of the express terms of the contract, as much as was the amount of the insurance, the party insured or to whom it was payable. They constituted the essential elements of a completed contract and of course could not be varied by parol. But the questions and answers in an application in this case, while they form the basis of the contract, are really propositions for a contract or proposals upon which it is issued, if satisfactory to the company. The evidence which was held inadmissible in the one case and that which was received in the other bear upon entirely distinct propositions. In the former it was excluded because it tended to vary a written contract by parol; in the latter it became admissible to show that the recitals in the applications are not under the circumstances the representations of the applicant, altho signed by

> him, but the statements of the company which had full knowledge of the facts and which is estopped from controverting the truth of the statements."

So, altho the *Buchanan* case places the distinction upon a different ground, it still distinguishes the case of *Insurance Co. vs. Wilkinson* and similar cases from the *Grandview Bldg. Association* case and the case at bar comes within this distinction in line with the *Wilkinson* case.

We have no quarrel with the decisions of *International Trading Company vs. John Sexton & Co.*, 24 Fed. (2nd) 12, or *Summit Coal Co. vs. Southern Cotton Oil Co.*, 24 Fed. (2nd) 859. They express the law but are not applicable to the facts of this case.

In the case of *Lincoln National Life Insurance Company vs. Bastian*, 31 Fed. (2nd) 859, there was an action by the life insurance company against the widow of the insured, and the beneficiary named in the policy. The nature of the action does not appear from the report. But the question determined was whether a personal check for part of the premium and a note for the balance accepted by the officers of the company under a written agreement signed by the secretary to the effect that if the note was paid at maturity the policy would not be forfeited kept the policy in force, the insured having died ten days before the note was due. The court held that it did, and there

can be no question but that the decision is right. In passing, it also held that the extension agreement signed by the secretary could not be modified by parol testimony. What the nature of this testimony was or in what respect it tended to modify this agreement does not appear.

The only point that this decision definitely decides is this: "Any agreement, declaration of course of action on the part of an insurance company which leads a party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will estop the company from insisting upon a forfeiture tho it might be claimed under the express letter of the contract." (Citing *Knickerbocker L. Ins. Co. vs. Norton*, 96 U. S. 234, 24 L. Ed. 689, and *New York Life Ins. Co. vs. Eggleston*, 96 U. S. 572, 24 L. Ed. 841.

The case also holds that a check, draft, or note may be accepted under such circumstances as to clearly indicate that a payment of the premium was effected thereby. (Citing 2 Joyce on Insurance, Sec. 2256).

The case of *Dickinson Tire and Machine Company vs. Dickinson*, 29 Fed. (2nd) 493, is not in point, tho it properly states the law of the case.

This concludes the consideration of the United States and Federal cases cited by counsel and we will next consider the state decisions relied on by

the appellant before taking up the state authorities supporting the view of the appellee.

In the case of *Francis vs. Mutual Life Insurance Company of New York* (Oregon), 106 Pac. 323, the policy was actually issued and sent to the local agent for delivery but the insured died before the delivery. The plaintiff was non-suited in the lower court and the upper court held that there was sufficient evidence to go to the jury upon the question of the delivery of the policy. In holding that the alleged temporary contract for parol insurance was not valid the court based its opinion upon the proposition that a mere soliciting agent could not make such a contract. This, however, was dictum and not necessary for the decision of the case. The case refers to the case of *Starr vs. Mutual Life Ins. Co. of New York* (Wash.), 83 Pac. 116, in which it was held that a binding receipt given by a soliciting agent constituted a preliminary contract of insurance tho it had the provision that the insurance was not effective unless accepted by the home office.

The last paragraph of the quoted excerpt from this case is good law as applied to local and mere soliciting agents, but does not apply to general agents, district or state managers as we will show by later cases cited by us.

In the case of *Missouri State L. Ins. Co. vs. Boles*, decided by the court of civil appeals of

Texas, 288 S. W. 271, the alleged oral contract was made by a mere soliciting agent. The evidence was also at variance with the pleadings.

In the case of *Banks vs. Clover Leaf Casualty Company*, decided by the Missouri Court of Appeals, 233 S. W. 78, the action was brought upon the policy as issued, which expressly provided when the contract became effective. The alleged oral modification was made by a mere soliciting agent. Our case would be more like it if the policy had been actually issued and we still relied upon the oral contract, except, that in our case the oral contract was made by the district manager.

In the case of *Ive vs. Inter. L. Ins. Co.*, 117 So. 176, the facts are very different from the instant case because in that case there was a special clause or provision in the application stating that no agreement made or information given by the person soliciting the application shall be binding upon the company unless reduced to writing and accepted by the executive officers of the company. This provision was of course notice to the insured of the limitations of the agent's authority. Here also the agent seemed to be a mere soliciting agent.

In the case of *Pralle vs. Metropolitan Life Ins. Company,* 252 Ill. App. 460, the alleged parol contract was made by an agent having no authority to waive the provision in the application.

The case of *Krueger vs. Osborn-Meyer Co.*, 228 N. W. 519, is not an insurance case and is not in point.

The case of *House vs. Bankers Reserve Life Company of Omaha* (Neb.), 180 N. W., is distinguishable on its facts from the case at bar. In that case the court said:

> "The application contained the following stipulation: 'No statement, representation or information made or given by or to the person soliciting or taking this application for a policy or to any other person shall be binding upon the company or in any manner affect its rights unless such statement, representation or information be reduced to writing and contained in this application.'
>
> "It is uncontroverted that this applicant for insurance, notwithstanding this oral conversation with said Salmons, executed and delivered to appellant the written application containing the said provisions hereinbefore quoted. Such are the usual and common stipulations in insurance applications. We are of the opinion that the said evidence of Newell, under the circumstances of this case, was erroneously admitted. Sec. 860, Code S. D., provides: 'The execution of a contract in writing whether the law requires it to be written or not, supercedes all the oral negotiations or stipulations concerning its matter whether preceding or accompanying the execution of the instrument.'
>
> "We are of the view that the testimony of the witness, Newell, is clearly within the rule established by this section."

The above case is, therefore, distinguishable from the case at bar in two important particulars. First, the application contained an absolute restriction upon the authority of the agent and the applicant is held to have had notice of it, and, secondly, the court refused to accept the parol testimony because it conflicted with the express code provisions of the state.

But, even on its facts, it seems to be against the great weight of authority.

Cooley, in his Briefs on Insurance, Vol. 5, p. 4014, says:

> "By the weight of recent authority a mere stipulation that no agent shall have power to waive conditions does not apply to a general agent, nor to a secretary or general manager. (Citing cases).
>
> "So, too, the superintendent of a foreign life insurance company doing business in a state may waive the forfeiture of a policy for non-payment of a premium tho the policy states that no waiver shall be valid unless in writing and signed by an officer."

Nichols vs. Prudential Insurance Company, Mo. App., 155 S. W. 478.

In this case the court held:

> "The superintendent of a foreign life insurance company doing business in this state may waive the forfeiture of a policy for non-payment of a premium, tho the policy states that no waiver shall be valid unless in writing and signed by an officer.

> "The prevailing doctrine in most of the states appears to be that restrictions in a policy on the power of agents with respect to waiver do not apply to those conditions which relate to the inception of the contract. (Citing cases)."

Cooley Briefs on Insurance, Vol. 5 p. 4024, Waiver and Estoppel.

Now, taking up the cases cited by appellant under subdivision (b) of its brief, under the heading "Such testimony tended to contradict or vary the written portion of a contract alleged to be 'partly oral and partly in writing.'"

We have examined carefully all of the cases cited by counsel for appellant in this portion of his brief and do not find that any of them are applicable on their facts to the case at bar. We will, however, review a few of them.

In the case of *Hope vs. Peck* (Okla.), 132 Pac. 344, the defendant set up certain oral additional warranties supplementary to the written agreement, but what the nature of the warranties were does not appear from the decision and the defendant evidently abandoned his case because he filed no brief in the matter.

In the case of *City Messenger & Delivery Co. vs. Postal Tel. Co.* (Ore.), 145 Pac. 657, the court said, after the quotation made by appellant in its brief:

> "A subsequent departure from the terms of a written contract by the parties and mutually acquiesced in, abrogates the original contract to that extent. A written agreement except where prohibited by positive law may be modified or annulled by a subsequent valid agreement of the parties. (Citing authorities)."

The case expressly holds that a parol waiver is good.

The case of *Lese vs. Lamprecht*, N. Y., 89 N. E. 365, is good law on its facts, but not in point.

In all these cases cited by appellant there were good and complete written contracts made and executed. In the case at bar such is not the fact. No complete written contract was ever made.

In the case of *Miller vs. Morine*, 149 N. W. 229, the lease was a completed written contract and we will show by the law in insurance contracts later in our brief that Iowa stands squarely with appellee and against appellant on this branch of the case.

Appellee absolutely refuses to agree with the proposition stated by appellant in subdivision (c) of its brief under the caption of "The written application cannot be contradicted or varied by parol evidence even if Hickman had powers broad enough to enable him to bind the appellant company in a proper way."

Such a rule followed to its logical conclusion would prohibit the executive officers of the company from making any parol waivers or modifications of a contract of insurance. None of the cases

cited by counsel so hold and we do not believe that any cases so holding can be found. As we pointed out when we reviewed the *Connecticut Fire Ins.* case, 141 Fed. 877, that court did not intend to overrule the case of *Insurance Company vs. Wilkinson*, but goes to considerable length in distinguishing it. However, we do not agree with the conclusion of that court that in none of the cases referred to was the decision made to turn upon any limitation upon the authority of the agent. In all of said cases there were such limitations upon the authority of the agents and this fact is expressly mentioned in the *Grandview* case as we have indicated in our brief and all of the subsequent cases followed the reasoning in the *Grandview* case.

Couch in his recent Cyclopedia of Insurance, published by the Law. Co-op. Pub. Co., 1929, says: "That restrictions in an insurance policy only relate to acts after the policy is delivered." (Sec. 522b) Citing, *Hartford Fire Ins. Company vs. Wilson*, 187 U. S. 467, 47 L. Ed. 261, and *Mutual B. L. Ins. Co. vs. Robison*, 58 Fed. 723, and other cases.

In *Hartford Fire Ins. Co. vs. Wilson*, which was decided after *Northern Ass. Co. vs. Grandview Bldg. Assn.*, it was held:

> "That the operative effect of a policy of fire insurance may by oral agreement between the agent of the company and the insured, made at the time the policy was issued, be made to

> depend upon the company's acceptance of the risk, notwithstanding various provisions of the policy restricting the powers of agents to alter its terms and requiring all additional terms and conditions to be indorsed thereon in writing, as such provisions apply only when the contract has been completed by an absolute delivery."

In *Mutual Life Ins. Co. vs. Robison*, 58 Fed. 723, the action was by an insurance company to cancel the insurance policy because of fraudulent answers to material questions in the application by the assured. It appeared that the agents of the company and the medical examiner set down as an answer "no" for the question as to whether applicant had ever "spit blood." The company in contesting the policy alleged that this was untrue. Court held that if it was untrue it was due to the acts of the agents of the company and it was estopped from questioning it. In this connection the Court said:

> "The application contains no limitations upon the powers of the agents or the medical examiner. Their powers were co-extensive with the business intrusted to them respectively. The clause in the policy withholding from the agents the authority to make, alter or discharge this or any other contract in relation to the matter of this insurance is not a limitation of the powers of the agents in preparing and accepting the applications for insurance. This provision of the policy does not take effect until the application is made and accepted."

From the above cases and especially from the *Wilson* case it would appear that a parol waiver is absolutely good if made during the inception of the contract and prior to its delivery, the theory being, that until the written contract is executed and completed that there may be parol modifications of terms and proposals that are to go into it. This is the distinction made also in the *Buchanan* case cited by counsel.

We will now continue with our authorities upon this branch of the case:

HARTFORD LIFE INS. CO. VS. HAYDEN

13 S. W. 585 (Ky. 1890)

This was an action on a life insurance policy. The application was taken by the local agent of the company and both the application and policy provided that no fee but the admission fee should be paid to the agent by the insured and that all subsequent fees should be paid to the home office at Hartford, Connecticut, and they also provided that no agent of the company was authorized to vary its terms. The Court said:

> "Undoubtedly the company could limit the power of Pursely who was but a special agent and if one dealing with him as such agent knew he had done so or as a prudent man should have so known then he did so at his peril as to matters beyond the agent's authority. Conceding that he had notice from the application and the policy that Pressly had no

right to collect the expense dues, yet it appears that one, Hamilton, who was the general manager of the company for Kentucky and several other states went with Pursley to the town where the insurance was taken upon the life of the deceased and together they solicited insurance there. They distributed the cards and presented statements of the company showing that Hamilton was such manager and he gave it out publicly that Pursely was the agent of the Company and authorized to receive the fees and dues for insurance There is evidence showing that he did collect them together with the expense fees with the knowledge and consent of Hamilton. The company could undoubtedly either expressly or inferentially by conduct waive this limitation upon the power of its agent. It could act only thru natural persons and here was its general manager upon the ground and saying to the public by both word and conduct that payment for all or any of the fees for insurance in it could be made to the local agent and that it would be all right.

"It is said, however, that this action is upon a written contract. That no fraud or mistake as to it is pleaded; that its terms cannot, therefore, be varied by oral evidence of what occurred contemporaneous with the making of it. This rule was designed to prevent fraud and further justice. If it were applicable and controlling under circumstances like those now presented it would be promotive of injustice. Here the general manager, who must be regarded as standing in the place of the company, publicly authorized the agent to receive all dues. He held him out to the public as so authorized. This operated to waive the restriction in the application and policy as to his

power in this respect and estops the company from now denying it . . . It may be said, however, that Hamilton was but an agent. Grant that as between him and his principal his powers were limited, yet the insured should not be treated as having notice of it from the terms of the application and the policy because the term agent as therein used should not be regarded as applying to a general manager of the company. *He represents it generally—it is present in him. The public naturally rely upon him as having full power in reference to its business and he should in fairness be regarded as so held out to the community by it. Especially should this be so where the home office of the company is located in another state.* Restrictions and terms in a policy will be construed most strongly against the company and in favor of the agent's powers as to those dealing with it. In *Carrigan vs. Insurance Company*, 53 Vt. 418, the policy provided that no agent had the power to waive any of the conditions of the policy and the provision was held to apply to local *but not general agents, the latter being presumed to possess authority to transact the business of the company generally.*

"Where a company is located in a state remote from that in which the insurance is effected, *one intrusted with the general management of the business in the latter state should be regarded as a general agent* (Insurance Co. vs. Booker, 9 Heisk. 606), *and possessing all the powers of those in charge of its business at its head or home office.* Both the interests of the company and the protection of the public require this to be the rule and as held in *Marcus vs. Insurance Company*, 68 N. Y. 625, *a clause in a policy that agents are*

not authorized to make, alter or discharge contracts should not be regarded as applying to general agents." (Italics ours).

I have quoted from this case at length because every objection raised in the case at bar was raised by the insurance company in that case and that case is very like this in its facts and the legal questions involved except that in that case there were restrictions in the application that we do not have in this case upon the powers of agents, and every contention made by the company in that case was decided against it on the facts and the law.

GLOVER VS. BALTIMORE NAT. FIRE INS. CO.
85 Fed. 125

In this case the Court said:

"The grounds upon which the court below was moved to reject the testimony were that all conversations between the parties were merged into the written contract and that parol evidence was inadmissible to show that the intent and meaning of the parties was different from what the words of the contract expressed and authorities of commanding weight are cited to support the proposition that when a policy contains plain and unambiguous language which has a settled legal construction, neither party can by parol evidence be permitted to prove that the instrument does not mean what it says. This motion proceeded upon a misconception of the object for which the testimony was offered. It is not for the purpose of changing the terms of the contract but to show that the circumstances were such that at the time the contract was entered

into the insurer actually knew all the facts relating to the risk and is estopped by such actual knowledge from setting up in avoidance of the policy either the mistake or omission to state those facts from its face . . . The agents here were general agents having power to write policies. If they knew at the time the policy was written that the house was occupied as a Keely Cure establishment and described it as a dwelling house the insurance company would be estopped from setting up such misdescription in avoidance of the policy. The principal does not admit oral testimony to vary or contradict that which is in writing but goes upon the idea that the writing offered in evidence was not the instrument of the party whose name is signed to it" . . . I May Insurance, Sec. 144, quoting from Am. Lead. Cases where an application had been signed by the assured . . . This principle which seems to have the sanction of all the writers upon insurance is consonant with sound reason. All of the business of insurance is done thru agents who are presumed to know and do know better than the community at large the requirements of their companies . . . That oral testimony may properly be offered to prove facts tending to create estoppels of this nature (estoppels in pais) is well settled in numerous cases of the highest authority. Citing, *Ins. Co. vs. Wilkinson*, 13 Wall 222; *Eames vs. Ins. Company*, 94 U. S. 621; *Ins. Co. vs. Mahone*, 21 Wall 152."

ROE VS. NATIONAL LIFE INS. CO.

(Iowa) 115 N. W. 500

In this case it was held in an action on a life insurance policy that parol evidence was admissible to show that the agent prepared the application and represented it to accord with insurer's rules and

regulations and to estop insurer from availing itself of the falsity of the statements contained therein. The Court said:

> "If this association was deceived this was owing to the neglect or wrongful manner of its agent in preparing the application under the sanction of its secretary and not because of any deception practiced by the deceased. For this reason the defendant is estopped from setting up the falsity of the answers in the application as a defense. *Stone vs. Ins. Co.*, (Iowa) 28 N. W. 89; *Donnely vs. Ins. Co.*, (Iowa) 28 N. W. 607. The above are fire insurance cases but the same rule is applicable to companies or associations insuring lives. *Con. Ins. Co. vs. Chamberlain*, 132 U. S. 304; *Lemmick vs. Ins. Co.*, (Mich.) 40 N. W. 469 . . . The evidence concerning the preparation of the application was received not to vary or contradict a written instrument but for the sole purpose of estopping the association from availing itself of the falsity of the statements contained therein as a defense and was admissible."

SHELDON VS. LIFE INS. CO.

25 Conn. 207, 65 Am. Dec. 565.

The question in this case was whether the present payment of the premium had been waived by the representative of the company. The Court said:

> "This the plaintiff undertook to show and offered evidence to prove that Norton, the agent of defendant, who did this business, and the general business of insuring for defendant in Suffield, where the parties lived, solicited Curtis, the intestate, to become insured in their

office. That Curtis declined, being then insured, and wishes delay because he had no money on hand to pay the premium as the terms of the policy required; that finally Norton agreed that he would provide for the premium himself and it would be considered and held to be paid, and the note for the balance to be given afterwards . . . It would seem that this arrangement, if made out by the plaintiff to the satisfaction of the jury, was material to the plaintiff's case and would establish the validity of his claim to a proper policy of insurance. This arrangement is one of daily occurrence where parties agree to an immediate insurance but time is given for the payment of the premium and the execution and delivery of the policy of insurance—the thing to be done is agreed to be considered as done, so that the obligation to pay the premium is the payment and the obligation to make out the policy is the policy itself. . . . Now the precise objection of the defendant is this: The 'provision,' 'premium paid' being in the written proposals it is said that parol evidence cannot be received to show that the insurance was to take effect before the premium was paid as this would be to vary the terms expressed in the writing. But this is not so. The principle of law is well enough stated but clearly has no application to this case. The evidence does not contradict or vary the writing but it is in harmony with it, for mode of payment or its legal equivalent or satisfaction is no part of the writing as claimed, which is the real question in dispute . . . Besides, it is everyday experience and our reports are full of said cases for persons to be held to have waived provisions and conditions in contracts for their own special benefit and, therefore, to be estopped from insisting upon that which is

inconsistent with what they have said and done to affect others. Curtis supposed the premium was agreed to be paid by the agent when the proposition for insurance was accepted at Hartford. The jury have found that both he and Norton so understood it . . . we cannot permit the defendant to deny or repudiate the act of their agent, if indeed he was their agent, in the transaction. . . . The defendant admitted that Norton was and had been their general agent for getting insurance in Suffield for many years before, and further, his manner of doing their business the jury found was well known to them and not disapproved of by them, but the defendants deny his authority in this instance to dispense with the payment of the premium on the making of the contract. This is a question of fact and the existence and extent of this authority is just the question which the plaintiff claimed should go to the jury."

ALLEN VS. PHOENIX INS. CO.
Ida., 95 Pac. 329.

This case held that a restriction in a policy, that a waiver to be effectual must be indorsed on a policy, could itself be waived and that parol evidence was admissible to show it. The Court said:

"This condition was inserted in the policy by the company and like any other condition can be waived or changed by the company or the insured, *McElroy vs. British Am. Assn.*, 94 Fed. 900 . . . a contracting party cannot so tie his own hands, so restrict his own legal capacity for future action that he had not the power even with the consent of the other party to bind or obligate himself by his future action or agreement contrary to the terms of the written contract."

MERCER VS. GERMANIA FIRE INS. CO.
(Ore.) 171 Pac. 412

In this case it was held that the insured could show by parol evidence that an agent of the company had told her that the contract of insurance, in the name of her divorced husband, was "all right" and she would not have to have it changed to protect her property which was now in her name, the company being estopped from taking a position contrary to the representations of the agent.

There are many more cases that could be cited that lay down the same fundamental rule of law and some of the cases that will be cited by us on other branches of the case also discuss or their decision involves this rule of evidence, but appellee submits her position is not only supported by the great weight of authority but is the only just and equitable rule under the facts in her case. Upon the principle laid down by the above cases the appellant company is clearly estopped from insisting upon the provision in the application that the contract of insurance did not go into effect until the policy was delivered to the insured in good health and the first premium was paid in cash, because, here the general or district manager whom we shall show by later cases had all the power of a general agent assured the insured at the time of signing the application and induced him to sign the application by such assurances, that the contract would go into effect at once provided he suc-

cessfully passed the medical examination, and the jury found this to be the fact. As has been said in the cases cited this is not an attempt to vary or contradict the terms of a written contract by parol evidence but simply to show by parol that the said provisions were never in the proposal submitted by Hickman because by his express representations he had impliedly waived them, and in this case there were no conditions against waiver in the application and the insured had no notice of the limitations in the secret agreement between Hickman and the company against Hickman's right to so waive them, if there were such restrictions. Hickman, the Intermountain manager, with exclusive jurisdiction over several states to represent the appellant, told the insured that he would accept his note for cash as payment for the first premium and that the contract of insurance would go into effect from that time provided he passed the medical examination, and induced him to make the contract on the strength of those assurances when at the same time he knew that there were conditions in the application which absolutely nullified his statements, unless his statements constituted a waiver of those conditions. To hold otherwise would be the grossest fraud upon the insured and upon his widow and the company is estopped from now insisting upon conditions that would nullify the contract in its inception.

III.

SUFFICIENCY OF PLEADINGS

In view of the position we have just taken it is hardly necessary to reply to that portion of appellant's brief embraced in Subdivision (2), page 104. Its view depends upon whether it is right regarding the parol evidence rule, which we do not admit, but, even conceding that appellant is right on its interpretation of the parol evidence rule it is difficult to see how a rule of evidence can determine the sufficiency of the pleadings.

However, on the pleadings our case is practically the same as the recent case of *Mayfield vs. Montana Life Ins. Co.*, (Mont. 1922) 205 Pac. 669.

The complaint in that case is as follows:

> "1. That defendant, Montana Life Insurance Company, was at the times mentioned and still is a corporation under the laws of the State of Montana, and that Geo. M. Gutch was the general agent of said company.
>
> "2. That Gutch was engaged in soliciting business for his company and while doing so it was his general practice and custom as such general agent to represent to prospective and actual patrons of his company that the insurance contemplated was binding from the date the first year's premium was paid, provided that the medical examination of the medical examiner was favorable and showed the applicant a good risk and that in the course of said business he had procured many profitable contracts of insurance for said life insurance company in this state. That on the 10th day of

September, 1918, Gutch as such general agent of defendant insurance company insured the life of Horace B. Mayfield in the sum of $1000.00 payable to his wife, the plaintiff by a contract partly oral and partly written. That Mayfield paid the first premium of said contract and thereupon the said insurance company executed and delivered to him his binding receipt as follows: No. 4677 . . . Sept. 10, 1918. Received this day from Horace B. Mayfield the sum of $45.00 in cash in full payment of the first annual premium of $45.00 on a life insurance policy of $1,000.00, applied from the Montana Life Ins. Company of Helena, Montana. This receipt is issued by the company subject to these terms and conditions printed on the other side hereof.

Signed Montana Life Ins. Co.,

"By J. M. Miller, Sec.

"Not valid unless signed by Geo. M. Gutch, Agent.

"Signed this.....day of.....19....,

"Geo. M. Gutch, Agent.

"That on the back of the receipt is printed in small type the following words, to-wit: Terms and conditions. (1) The applicant agrees to be promptly examined by a regular appointed medical examiner of the company. If the applicant fails to present himself for such examination within a period of 60 days from the date of this receipt, the amount paid by the applicant shall by the option of the company be forfeited to the company. (2) The insurance applied for by the terms of this receipt shall take effect upon the date of approval of the same at the home office of the company, after the full premium thereof has been paid in cash, otherwise

said insurance shall not take effect until the balance of the premium has been paid to the company or its agent. (3) If the insurance hereby applied for is not approved by the company within 60 days of the receipt by the completed application therefor at the home office, the amount paid hereunder shall be returned to the applicant.

"3. That in making the said contract said Gutch followed his general custom and represented to Mayfield that said contract was in force from said date.

"4. It is further alleged that the above mentioned terms and conditions numbered (1), (2) and (3) were not considered as a part of said insurance contract by either of the parties thereto and that they were no part of said contract. That Gutch as such general agent agreed with Mayfield to have said insurance contract embodied into a written policy of insurance to be executed and delivered to him within a reasonable time, but that the insurance company had negligently and illegally refused to issue the said policy. It is further alleged that on or about Sept. 10, 1918, at the special instance and request of Gutch, as general agent of the insurance company, Mayfield went to Dr. E. P. Colvin, an examining physician, duly appointed by and acting for said company, and was duly examined in the manner required by the said company, which examination was favorable and of such disclosures and nature as to warrant and justify the insurance as agreed upon, and disclosed said Mayfield as a good insurance risk at that time as contemplated in said insurance contract, and thereupon and at that time said Gutch again informed him that he was insured in the said company in the sum of $1,000.00

and that in case of his death his wife would receive the sum of $1,000.00 and that the company would be obligated to pay $1,000.00 from that date.

"It is further alleged that Mayfield was particularly desirous of having his life insured at that particular time as he was contemplating a trip and because an epidemic of influenza was prevalent in his community at that time, and had he not believed and relied on the statements made by the general agent he would not have taken insurance with the defendant company.

"It is further alleged that Mayfield started on the trip with his horses and contracted influenza and as a result died on October 20, 1918."

Defendant company demurred to the complaint and it was sustained and plaintiff elected to stand on the complaint and appealed to this court.

Court held in sustaining the complaint and overruling the demurrer: That an oral contract of insurance is good and that a general agent was the company's alter ego. If a general agent, his powers to waive conditions and forfeitures is according to the weight of authority co-extensive with the insurance company itself. Citing Cooley's Briefs on the Law of Insurance, Vol. 3, page 2478, and *Halle vs. New York Life Insurance Company*, 58 S. W., and other cases. Court said:

"We hold that under these allegations the general agent, Gutch, was clothed, prima facie, with the ostensible authority to and did waive

> the conditions of the receipt issued to Mayfield and that his agreement that the insurance should be in effect from the date of its issuance was binding upon the company."

That complaint is practically similar to the one at bar and fully sustains the pleadings in this case.

IV.

THE EVIDENCE WAS SUFFICIENT TO ESTABLISH HICKMAN AS THE INTER-MOUNTAIN MANAGER AND GENERAL AGENT OF APPELLANT AND WAS PROPERLY ADMITTED.

We will answer under this heading all the objections raised under appellant's caption (3), (a), page 107, of its brief.

The rule regarding the proof of agency is as follows:

> "While the declarations of an alleged agent are not admissible to prove agency, if the agency is otherwise prima facie proved they become admissible in corroboration."
>
> 31 Cyc. 1655.

The Encyclopedia of Evidence states the rule as follows:

> "Evidence of the acts and declarations of agents is admissible when there is some other evidence of agency, the jury being the judges of its sufficiency."

Encyclopedia of Evidence, Vol. 10, page 19.

There was other evidence of Hickman's agency in this case besides his acts and declarations. Hickman, himself, testified fully as to both the character and extent of his agency and the rule is well established that an agent may testify as to both his agency and the scope thereof.

Encyclopedia of Evidence, Vol. 10, page 14, and cases cited, and Vol. 10, page 15.

In the case of *Security Life Ins. Co. vs. Bates* (Ark.), 222 S. W. 740, the agent testified that he was the general agent for the company and it was held sufficient.

In the case of *Stewart vs. Mutual Life Ins. Company* (N. Y.), 49 N. E. 876, Crane in his testimony stated that he was the agent for the defendant and was known as the manager for the New York department.

The same rule was laid down in *O'Leary vs. German Insurance Company* (Iowa), 69 N. W. 686, where he was permitted to testify both as to his agency and his powers and the scope of his agency.

Hickman's pertinent testimony as to his agency is as follows:

> "About that time (Jan. 5, 1924) I signed the contract with The Bankers Reserve Life Company to act as Intermountain manager for Utah, Nevada and Southern Idaho. My duties

were to act in the capacity of appointing agents for the company and also to write insurance. When I found a person who seemed to have the ability and inclination to go into life insurance work, I executed a contract between him and the company and sent it to the company for its signature. Under my contract with the company the territory which it covered was an exclusive territory. There was no other business handled in the office in Salt Lake City other than that which I procured (Transcript, page 83). I had been in the insurance business seven and one-half years before I went with the Bankers Reserve Life Company, those years having been spent as agency manager for the Intermountain Life. The territory embraced in my contract with the defendant company was Nevada, Utah and Southern Idaho. Amongst my duties as Intermountain manager was the selection of sub-agents and these agents worked under me. About twenty agents were working for me in the State of Utah in November, 1926 (Transcript, pages 86 and 87), and two in the State of Nevada. I continued to act for the Bankers Reserve Life Company as Intermountain manager for five years, from 1924 to 1929. In having sub-agents appointed, it was my practice to interview the applicants first and go over their qualifications; in some cases they had to be trained to write insurance (Transcript, page 88). Those that required training were trained in my office. The Bankers Reserve Life Company maintained an office in Salt Lake City at 601-602 Deseret Bank Building for which it paid the rent. The company also paid all of my clerical hire. Miss Birrell was the only employee of the Company I had. She acted as my secretary and also was cashier for the company. She took my dictation and took

charge of all that sort of work (Transcript, page 89). I was not paid a salary but was entirely on a commission basis. My commissions included part of those earned by subagents. I also received commissions on renewals, collected money on renewals at my office. On the door of my office at 601-602 Deseret Bank Building, while acting for the defendant company, I had a sign reading: F. L. Hickman, Intermountain Manager for the Bankers Reserve Life Company (Transcript, page 90). I had published an annual statement containing a synopsis of the business of the Bankers Reserve Life Company, similar to the one attached to the certificate of Commissioner McQuarrie, for both the years 1925 and 1926, under the caption of F. L. Hickman, Intermountain Manager (Transcript, page 92). I used stationery with the following legend on it while Intermountain manager for defendant company: 'The Bankers Reserve Life Company, Omaha, Nebraska. Its policies not excelled in the World. F. L. Hickman, Intermountain Manager. 601-602 Deseret Bank Building, Salt Lake City.' When I communicated with the defendant company with reference to their business I used this and other stationery with similar wording on it (Transcript, page 93). I know Mr. Steven Doutre, of Spring Valley, White Pine County, Nevada. Mr. Robison introduced me to him as Intermountain Manager (Transcript, page 98). Copies of the reports of the company's annual business, published in Salt Lake City under the caption of F. L. Hickman, Intermountain Manager, 602 Deseret Bank Building, were sent to the home office at Omaha, Nebraska, for the years 1925, 1926 and 1927 (Transcript, page 99). I also used business cards while representing the

> Bankers Reserve Life Company, on which were the words, 'Bankers Reserve Life Company, Omaha, Nebraska, F. L. Hickman, Intermountain Manager, Salt Lake City, Utah, 602 Deseret Bank Building.' I had those cards with me when I interviewed Mr. Steven Doutre and I generally left them with the people I called upon and I also distributed a lot of eye-shades with the same words on them, through Spring Valley near where Mr. Doutre lived (Transcript, pages 100-101). I had authority to discharge sub-agents, my contract provides for that, what I mean, the contract made no provision for me cancelling but the practice of the company—the company acted in harmony with the agency manager by cancelling the license of any agent that the director might ask for. The company never refused to cancel an agent's contract while I was with them (Transcript, pages 192-193)."

This testimony, most of it elicited under the questioning of the appellant's attorney, establishes clearly the character of Hickman's agency and also the scope of it. By this evidence it cannot be doubted that he was the Intermountain manager of the appellant company with headquarters in Salt Lake City, at 601-602 Deseret Bank Building.

But without regarding his own testimony, which was absolutely competent for the purpose, there is still prima facie evidence in the record of his agency. The Yelland application was signed by Hickman, under the printed designation of "agent," and that application was made a part of appellant's answer in the lower court (Transcript, page 31).

"If the agency is proven without showing its extent, it is presumed to be general and not special in respect to the business with which the agency is concerned."

31 Cyc. page 1639.

In FIRE INSURANCE COMPANY VS. BUILDING ASSN.,

43 N. J. Law 656-657.

The Court said: "Upon the policy, when delivered, was this endorsement. H. C. Hemingway, Agent, the word 'agent' being printed in the form. The policy itself contained no notice that there was any limitation upon the power of the agent and there was no evidence to charge the insured with knowledge of any limitation. Under such circumstances with what authority will the law presume the agent was invested? The true answer to this query will correctly solve the controversy. He must either be treated as a special agent or a general agent in the sense in which the term has heretofore been defined There is no middle ground to stand upon. If it is deemed a special agency, then it was the duty of the insured to acquaint himself with the limitations by which the power of the agent was circumscribed before he dealt with him. This would render insurance thru an agency entirely delusive and prove a mere snare to the unwary, for even the right to deliver the policy might be hampered with secret instructions. The company said to the insured, this is my agent. You may deal with him as such, not intimating that there were any qualifications or restraint upon his powers. Being held out as an agent without the expression of any limitations, public policy and good faith unite in requiring that general authority shall be ascribed to him as the defendant's representative (citing cases)."

Therefore, *the agency of Hickman having been established independently of his declarations and acts, all of his declarations and acts are admissible in corroboration and under this rule, his statements, stationery, sign on his door and the publication in the Salt Lake Tribune, his business cards and eyeshades are all admissible and were properly admitted by the lower court.*

There is absolute proof in the record, however, that the appellant company *knew or by the exercise of reasonable care should have known that Hickman was holding himself out as the Intermountain manager with headquarters in Salt Lake City, and it is chargeable with that fact and the jury so found.*

W. G. Preston, the executive vice president, admits it, however reluctantly.

In answer to the question in his deposition,

> "Did you not recognize Mr. Hickman as your Intermountain manager with offices in Salt Lake City?" Answer: "*Yes, I think we did, in our correspondence*" (Transcript, page 83).

E. L. Dunn, the recording secretary of the company, in his deposition, also reluctantly admitted that the letter of advice with reference to the Yellant application was received at the home office in one of Hickman's regular envelopes which contained the words: "The Bankers Reserve Life Company, Omaha, Nebraska, etc. Return after 5

days to F. L. Hickman, Intermountain Manager, 601 Deseret Bank Building, Salt Lake City, Utah." (Transcript, pages 159-160).

The said Dunn also testified in his deposition, unwittingly, perhaps, as follows:

> "Mr. Hickman had authority to mail these inquiries from his office. So far as the custom with reference to the sending out of these inquiries is concerned, some of the branch managers send them out and some don't." (Transcript, page 157).

This testimony indicates that Hickman was regarded as a "branch manager or district manager" at the home office.

In addition to this direct testimony, and it must be remembered in this connection that both Dunn and Preston as well as Hickman were witnesses in the lower court for appellant, and the depositions of all of them were taken by appellant, we have the publication in Salt Lake City, Utah, of the annual statement or synopsis of the annual statement of the appellant's business for the years 1925, 1926 and 1927, all under the caption of F. L. Hickman, Intermountain Manager, 601 Deseret Bank Building, as required by the insurance statutes of the State of Utah (Transcript, page 72), and pursuant to the Utah statute copies of such publication, such as is attached to Insurance Commissioner McQuarrie's certificate as an exhibit, were filed in the office of the said commissioner in Salt Lake City and were public records of what

they purported to set forth (Transcript, pages 76-81), *and copies of these publications were sent to the home office of the company, and thus the said company was charged again with knowledge that Hickman was holding himself out to the public as the Intermountain Manager of the company.* For five years Hickman corresponded with them on stationery charging them with knowledge that he was holding himself out as their Intermountain manager. Can it be reasonably said that with all of this they did not know that Hickman was so holding himself out? They never denied it until this suit, and the jury found, and there was ample evidence in the record for them to do so, that the Bankers Reserve Life Company knew that Hickman was holding himself out as its Intermountain manager.

In fact, the evidence is so strong in this regard that the rule laid down as follows should apply to this case:

> "As a general rule the fact of agency cannot be established by proof of acts of the pretended agent in the absence of evidence tending to show the principal's knowledge of such acts or assent to them. Yet, when the acts are of such a character and so continued as to justify an inference that the principal knew of them and would not have permitted the same if unauthorized, the acts themselves are competent evidence of agency."
>
> 31 Cyc. 1662.

> "If a person acts openingly and notoriously in exercising the duties of a particular agency and under such circumstances as imply knowledge of the company, the presumption attaches that he has the authority he thus claims to possess."

Couch Encyclopedia of Ins., Section 516.

The case of *Douglas vs. Insurance Company of North America,* 215 Mich. 529, 184 N. W. 539, lays down the general rule in this regard as follows:

> "The difficulty of showing the agent's authority by direct and positive proof, particularly in the case of corporations which can only act thru agents, is recognized, and such proof is not imperative. The existence of an agency may be inferred from attending facts and circumstances, and if there be in proof facts from which an agent's authority can be fairly and reasonably inferred, *the question becomes one for a jury.*"

The case of *Jos. Schlitz Brewing Company vs. Grimmon,* a Nevada case, cited in 81 Pac. 43, is relied on by appellant on this branch of his case.

In this case Shape was not an agent for the company at all but a mere solicitor for beer. The company knew nothing about his holding himself out as being connected with them as an agent and his assumption of that role under the facts of the case was not binding on the Brewing company.

In the case of *United States Smelting, Refining Company vs. Wallapai, etc.,* 230 Pac. 1109, also cited by counsel in support of his view, there ap-

pears to have been offered no other evidence in support of the alleged agency than the letterheads, and it does not appear that these letterheads had anything on them indicating the character of Anderson's agency, or that defendant company knew anything about them.

There are, however, many insurance cases in which letterheads, cards and literature on which a certain agent was held out as manager, etc., that have been considered by the court as evidence of agency.

One such case was that of *Hartford Life Ins. Co. vs. Hayden*, 13 S. W. 585, already referred to in our brief, in which it was said:

> "They (the local agent and general manager) distributed cards and printed statements of the company showing that Hamilton was such manager."

In the recent case of *Manhattan Life Ins. Co. vs. Stubbs*, (Texas), 234 S. W. 1099, the Court said:

> "Green was the general agent of the insurance company and was manager of its southwestern department with headquarters at Dallas, Texas. *His stationery showed these facts to be true.*" (Italics ours).

There seems to be no case which denies the admission of such evidence where there is other evidence of agency as there is in the case at bar, and particularly when the insurance company knows of it as in this case.

The same rule was upheld in the case of *Stewart vs. Mutual Life Insurance Company* (N. Y.), 49 N. E. 876. The Court said:

> "In referring to the letters that were written in this case upon the stationery furnished by defendant we find printed headings containing the name of the defendant company and the folowing: 'Metropolitan District, 96 Broadway, Shemmerhorn Bldg., John M. Crane, Manager.' "

In the last case it is true that the defendant furnished the stationery, but that was only proof that they knew of it, and in the case at bar the company also knew of it and "recognized Hickman as their Intermountain manager with offices in Salt Lake thru their correspondence."

V.

WHERE THE AGENT IS A GENERAL AGENT OR DISTRICT MANAGER OR MANAGER, THE PARTY DEALING WITH HIM DOES NOT HAVE TO MAKE ANY INVESTIGATION RESPECTING HIS AUTHORITY, UNLESS HE HAS NOTICE OF LIMITATIONS UPON HIS AUTHORITY,

and

HICKMAN WAS THE DISTRICT MANAGER AND GENERAL AGENT OF APPELLANT COMPANY, AND AS SUCH HAD OSTENSIBLE AUTHORITY TO BIND APPELLANT COMPANY BY AN ORAL CONTRACT OF INSURANCE.

Under this general heading we will deal with the questions raised by appellant under subdivisions (c) and (d) of his brief (pages 120 and 126).

The great weight of authority is that the designations general managers, managers, district managers, and general agents are all synonymous and imply equal powers and that where an insurance company holds a representative out with those titles it is bound by their acts within the scope or apparent scope of their authority and that their authority, generally speaking, is as broad as that of the company itself in their particular districts and that in fact they are regarded as the company itself or its "alter ego."

> "The extent of an agent's power to waive conditions and forfeitures is of course dependent upon his authority to act for the insurer. If he is a general agent, his power to waive conditions and forfeitures is, according to the weight of authority, co-extensive with that of the insurance company itself. Usually the powers of agents representing life insurance companies are regarded as more limited than those of agents acting for fire insurance companies, but with reference to waiver no distinction seems to be made between the powers of a general agent of a life insurance company and that of a fire insurance company, for the rule is that the waiver of a condition in a policy of life insurance by a general agent is within the apparent scope of his authority.
>
> "The authority of general agents to waive conditions is shared by the state managers of

foreign corporations. Such managers are presumed, in the absence of evidence to the contrary, to have the power of executive officers in respect to waiving conditions in a policy."

Cooley Briefs on the Law of Insurance, pages 2478-2479.

"Where agents of foreign companies represent them as general managers they have generally large discretionary powers in regard to making insurance contracts, and transacting business relating thereto. Their powers are similar to officers of the company."

Joyce on Insurance, Vol. I, Sec. 406.

"Agents of foreign corporations representing them as general managers or managers have generally large discretionary powers in regard to making insurance contracts and transacting business relating thereto, their powers being similar to officers of the company. They may also waive conditions in a policy and estop a company by their acts within the scope of their authority."

Cyclopedia of Insurance, Couch, Sec. 509g.

ELECTRIC LIFE INSURANCE COMPANY VS. FAHRENKRUG,

68 Ill. 463.

In the above case the defendant was a non-resident corporation having a general office in Chicago which was under the control of one Johnson, whose official designation by defendant was that of "manager." We are not informed of the exact scope of his powers or extent of his duties. He

was, however, regarded as a general agent and had in his employ a clerk and bookkeeper. The office was indicated to the public by a sign on which were in conspicuous golden letters the words: Electric Life Insurance Company, August Johnson, Manager.

Held that a clerk in charge of such an office during Johnson's absence could bind the company with reference to his acts regarding the payment of premiums and the company would be estopped thereby.

HARTFORD LIFE INSURANCE COMPANY VS. HAYDEN,
13 S. W. 585 (Ky.)

Court said:

"Undoubtedly the company could limit the power of Pursley, who was but a special agent, and if one dealing with him as such agent knows he had done so or as a prudent man should have so known, then he did so at his peril as to matters beyond the agent's authority. But with reference to Hamilton, the general manager, the rule was different: Here was its general manager upon the ground and saying to the public that payments could be made to the local agent (which were prohibited by the terms of the application and policy). . . . *Here the general manager, who must be regarded as standing in the place of the company, practically authorized the agent to receive all dues. He represents it generally. It is present in him. The public naturally rely upon him as having full power in reference to its business and he should in fairness be regarded as so held out to the community*

by it. Especially should this be so where the home office of the company is located in another state. The term agent as used in the application should not be regarded as applying to a general manager." (Italics ours).

McGURK VS. METROPOLITAN LIFE INS. CO.,
(Conn.) 16 Atl. 263.

This was an action on a life insurance policy and the question was whether the assistant superintendent by his knowledge when the application was taken, had waived the condition in the policy that it would be void if the insured engaged in the liquor business and thus estopped the company from insisting on a forfeiture. The duties of assistance superintendent of districts were to employ and instruct agents in the duties of canvassing for applications for insurance and the collection of premiums and to inspect their business and examine account of premiums collected. The Court said:

"All the business of the defendant in procuring applications for insurance, delivering policies and collecting premiums was committed to this class of agents. If one having the entire management might properly be called a general agent, it is difficult to see why one having the same management over certain territory might not in like manner be properly so called. It is everywhere held that information which comes to an agent concerning the business he is transacting for his principal within the limits of his agency is information to his principal."

And the opinion goes on to show that it was his duty to disclose this information to his principal, citing cases. The company was held estopped.

It will be observed that the duties of the assistant superintendent in this case were similar to those of a state manager such as Hickman was and that he stands in the place of the company.

MANHATTAN LIFE INS. CO. VS. STUBBS,
(Texas), 234 S. W. 1099.

This was an action on a 15-year endowment policy. The policy was solicited by a local agent who stated that the dividends at the end of 15 years would amount to $1215.00. After the policy had been delivered and first year's premium had been paid, there was some doubt in the mind of the assignee of the insured about the dividends and he did not want to pay the second premium until it was straightened out. Thereupon, Mr. Green, the Southwestern manager, wrote him that the dividends would be between $1200.00 and $1300.00, and upon that assurance the premium was paid. At the maturity of the policy the company tendered its face, $5000.00, plus $90.00, which it claimed were all the dividends due under the policy and its provisions. The owner of the policy brought suit and the question was whether the company was bound by the representations of the Southwestern manager.

The company defended on the ground that both the application and the policy contained the following limitations upon the agent's authority:

> "That no statements or promises of any agent of the company unless written upon this application shall be binding upon the company nor shall any alteration of or addition to the terms and conditions contained in the application or the policy be binding unless in writing and signed by the president and secretary."

The Circuit Court of Appeals rendered the following decision:

> "The appellee was bound by the express limitations upon the authority of the agent contained in the policy itself and the application therefor, all of which he had or was effected with notice, and was, therefore in no position to rely upon any apparent authority or ostensible authority of the agents, Green and Collins, to commit the principal to their individual statements that the insured would at maturity of the policy receive a certain amount of dividends, none of these statements appearing in the application or policy." (Citing cases).

The Court said:

> "We cannot concur in the holding just quoted. The authorities cited by the Circuit Court of Civil Appeals are all cases in which *only local and soliciting agents were involved and are not in point with the case at bar. In the instant case the rights of the parties center around the assurances given by A. A. Green, Jr., to Stubbs. Green was the general agent of the insurance company and was manager of its southwestern department* with headquarters at Dallas, Texas. His stationery

showed these facts to be true and the vice president of the company, with headquarters at the home office in New York, testified that Green was the general agent of the company." (Italics ours).

The Court then cites authorities to show that limitations in the application or policy may be waived by the general agent, citing in particular the case of *Forman vs. Mutual Life Ins. Co.*, 73 Ky. 547, 191 S. W. 279, Ann. Cas. 1918 E 880. The Court then goes on:

> "Again it is true that no matter what may have been the original contract of insurance the facts show that a *renewal of the old contract was the result of the Green letter. Stubbs was dissatisfied and had sent the annual receipt back and 'quit the game,' as he expressed it. But on the strength of the letter from Green promising the large dividends he re-instated the policy by making payment of the premium within the thirty-day grace period. It was in a sense a new contract.*" (Italics ours).

And the court goes on to show that such a contract may be made by parol. In this case also the company pleaded its contract with Green to show that Green had no such authority, but the Court held that Stubbs had no notice of the exact terms of the contract between Green and the company and was not bound thereby. In this connection the Court says:

> "It is worthy of note in speaking of this contract between the company and Green to bear in mind that he was in charge of all the records of the company at Texas headquarters and made up these records. The letter here shows that it was copied and an impression thereof taken. Certainly the company must take notice of the contents of its own records in an office of this kind and yet during all of these years no effort was made to repudiate the letter in which Stubbs was promised dividends ranging from $1200 to $1300."

This case is absolutely in point with the case at bar both in principle and on its facts. In this case Green is the southwestern manager having jurisdiction over several states, with headquarters at Dallas. In the case at bar Hickman was the Intermountain manager having jurisdiction over several states with headquarters in Salt Lake City. In this case Green induced Stubbs to renew his policy, which amounted to the making of a new contract, on the strength of his assurances that the contract paid certain dividends, which it was claimed was contrary to the provisions of the policy; in the instant case, Hickman made representations which induced Yelland to make his contract of insurance; that is, by stating to him that the policy would go into effect at once provided he passed successfully the medical examination. Both representations went to the very inception of the contract, and both were claimed to be against and contradictory of certain provisions in the contract. In this case the authority of the southwestern man-

ager, Green, to do what he did was sustained; that is, the company was estopped from taking advantage of the limitations in the contract, and we submit in the case at bar the appellant should be estopped for the same reasons. Also, in both cases the insurance company claimed that the secret contracts between the agents and the company conferred no such powers upon them, and in neither case were these limitations brought home to the insured. In this case the district manager was held to be a general agent, and in the case at bar Hickman is likewise a general agent.

WHIPPLE VS. PRUDENTIAL LIFE INS. CO. OF AMERICA,

(N. Y., 1917), 118 N. E. 211.

This was an action on a life insurance policy. It was defended on the ground that the policy was inchoate and ineffective because the premium had not been paid at the time of the death of the insured. The application contained the following provision:

> "It is hereby agreed . . . that said policy shall not take effect until the same shall be issued and delivered by the said company and the first premium paid thereon in full while my health is in the same condition as described in this application."

The policy also contained the following provision:

"No condition, provision or privilege of this policy can be waived or modified in any case except by an endorsement hereon signed by the president, one of the vice presidents, the secretary or mortuary.

"No agent has power in behalf of the company to make or modify this or any other contract of insurance, to extend the time for paying a premium, to waive any forfeitures, or to bind the company by making any promises or making or receiving any representation or information."
The Court said:

"The following reasoning is sound, impeccable, and established in this jurisdiction. The application is the proposition or request for the contract of insurance between the applicant and the company, the statements of which upon its acceptance by the company bind the applicant and create correlative rights to the company. The company may relinquish or waive any of such rights. The obligations or rights of the applicant cannot be restricted or effected by any provision of the policy as a contract until the policy has taken effect and become a contract between the parties. The provision of the policy last quoted by us or any analogous provision of a policy has no contractural restrictive power in or upon the right of freedom of the company to waive the stipulation that the policy shall not take effect until the first remium is paid in full, because it is not until the waiver has been made (the premium remaining unpaid) that the policy becomes a contract between the parties or binding as a whole or as to individual provisions as a contract upon the assured. (Citing cases). There is evidence tending to show

that Wilson effected the waiver by delivering the policy and taking a note for part payment of the first premium. The designation of Wilson as manager and the acts of Wilson adopted by the defendant permit a reasonable inference that he was the agent of the defendant invested with the general conduct and control at Cleveland of the business of the defendant and that his acts were presumptively those of the company. *The designation of manager implies general powers. It could not be said as a matter of law that he did not possess as general agent general powers.*' " (Italics ours).

STEWART VS. MUTUAL LIFE INS. CO.

(N. Y.), 49 N. E. 876.

This was an action on a life insurance policy. The application and the policy both provided that the contract would not become effective until delivered to insured in good health and the first premium had been paid in cash and they both provided that no agent or any other person, except the president or secretary in writing, had power to alter or change in any way the terms of the contract or to waive a forfeiture or write anything on the policy.

At the time the policy was delivered the insured gave his note for three months to Crane instead of the cash payment, and Crane accepted it. When the note fell due insured sent his check in payment and it came back protested. Crane wrote him about it and he said he was sick and would attend to it as soon as got well, but he died without

paying the check. Held that the waiver and extension of time by Crane bound the company.

The Court said:

> "Crane in his testimony stated that he was the agent for the defendant and was known as the manager of the New York department, which he described as a regular department in which the company had a cashier and that the company furnished the stationery that was used in his department. In referring to the letters that were written in this case upon the stationery furnished by defendant we find printed headings containing the name of the defendant company, the name of the president, etc., together with the following: Metropolitan District, 96 Broadway. Shemmerhorn Bldg., John M. Crane, Manager, J. H. Semeton, Cashier."

This case in effect holds that provisions like those in the Yelland application could be waived by the manager of the company and here the manager was a district manager as in the case at bar and also expressly provided against waiver as it does not in our case.

HALLE VS. NEW YORK LIFE,
(Ky., 1900), 58 S. W. 823.

Action on life insurance policy. The insured signed an application for insurance in Brazil tendered him by the general agent there for the defendant company, paid the first premium and passed the medical examination. The general agent stated that the policy would take effect from

the date of the application. A conditional receipt was given insured in the following words:

> "Received from Mr. Joseph Halle the sum of 460 milreis, Brazilian money of the United States, to be applied to the first half yearly premium on an insurance of 20,000 milreis, Brazilian money, on the life of the same, for which a formal application made to the New York Life Ins. Co. provided that the said application be accepted by the said company and that policy is issued by virtue thereof. If said insurance is issued it shall begin Sept. 21, 1892 (date of application), subject to conditions and clauses of said policy. It is further understood and agreed that if company does not issue policy . . . the above sum will be refunded to bearer of this receipt . . . No one but the president, vice president and (other executive officers, naming them) is authorized to make, alter or cancel contracts or waive forfeitures."

Court said:

> "It is shown by satisfactory and uncontradicted proof that it was agreed between the agent and insured that the insurance should begin on the date of the receipt, the time the first premium was paid."

When the application reached N. Y. it was not accepted or rejected but a different form of policy sent, which insured refused to accept, and before the matter was adjusted insured died. It was held to be a good temporary contract of insurance.

The Court said:

> "To the contention that the applicant agreed otherwise in the application and that no officer

> or agent other than the president, vice president, etc., could make special contracts, it is sufficient to say that the agent, Garcia, *was the general agent of the company and so signed his name in the application of Halle, which was considered by the company. The restrictions in the application on the power of the agent do not affect the authority of the general agent to do what those dealing with him were authorized to believe he had the right to do.* (Citing cases).

This case is also like the Yelland case in that no policy was issued in either case and in both cases the general agent of the insurance companies made a parol agreement for immediate insurance. In this case the Court held it a good temporary contract of insurance, and the Yelland contract can be sustained on the same theory.

SECURITY LIFE INSURANCE CO. VS. BATES,
(Ark.), 222 S. W. 740.

Action on life insurance policy. Company defended on the ground that the policy had been forfeited because the insured had not complied with the war clause contained in it. The policy contained a provision that it would be incontestible after one year, except for naval and military service in time of war without a permit, which risks are not assumed by the company. The general agent for the company gave a parol consent to enlistment and the question was whether it was good. The Court said:

"Wirt testified that he was the general agent for the company in local territory. The general rule is that the principal is bound by the acts of its agent within the authority conferred upon him and this includes what is really necessary in the performance of those duties. In discussing the authority of a general agent in *Oak Leaf Mill Co. vs. Cooper*, 103 Ark. 79, 146 S. W. 130, the Court said: '*A principal is not only bound by the acts of the agent done under express authority, but he is also bound by all acts of the general agent which are within the apparent scope of his general authority, whether they have been authorized by the principal or not, and even if they are contrary to express directions. The principal in such cases is not only bound by the authority actually given to the general agent, but by the authority which the third person dealing with him has a right to believe has been given to him* (Citing cases). *The question in all such cases with reference to the acts of a general agent is not whether the authority of said agents was limited, but whether the one dealing with such agent has knowledge or notice of such limitation of his authority. Under the state of the record the court was justified in finding Wirt was the general agent for the company at D. and possessed at least the apparent authority to receive the application for a permit to enlist in the army and to accept the same.*' " (Italics ours).

MAYFIELD VS. MONTANA LIFE INS. CO.,
(Montana, 1922), 205 Pac. 669.

This case has been referred to before in this brief and it upholds a parol contract of insurance practically like the one at bar which was made by a

general agent but who was in fact the state manager of the company for Montana. The Court said in that case that the general agent was the "alter ego" of the company and could do what the company did in reference to making contracts and making waivers. Attention is respectfully called to the digest of the case made in the earlier part of the brief.

The right to make oral contracts of insurance has been upheld in many cases, both Federal and state. Without taking further time to digest them, attention is called to the following:

HARTFORD FIRE INSURANCE CO. VS. TATUM,
5 Fed. (2nd) 169.

This was an action to enforce a contract for parol insurance which was held good as a preliminary binding contract.

Relief Fire Ins. Co. vs. Shaw, 94 U. S. 574, 24 L. Ed. 291;

Eames vs. Home Insurance Company, 94 U. S. 621, 24 L. Ed. 298.

Upholding preliminary oral contract of insurance.

AETNA INS. CO. VS. HARTFORD, ETC. MILLING CO.,
19 Fed. (2nd) 177 (6th Circuit).

This was an action for fire insurance. In this case Bennett, local agent, called up Stone, general agent, and after talking to him turned to insured and said the insurance is on and "it will take effect

immediately." This held to constitute a good preliminary oral contract of insurance tho property burned before policy was issued.

United States Fidelity & Guarantee Co. vs. Goldberger (3rd Circuit), 13 Fed (2nd) 799.

Upholding right of agent to orally bind company to immediate insurance on automobile accident policy.

SCHWARTZ VS. NORTHERN LIFE INSURANCE CO., 1928, 25 Fed (2nd) 555, (9th Circuit)

In this case the policy was written by general agent who signed a binding receipt to the effect that risk would commence when a satisfactory medical examination would be made. The Court said:

> "The date from which a policy becomes effective is not necessarily determined by the date which it bears or the date of its execution or the date of its delivery or by the date when the first premium is paid. It is the date from which the risk commenced and is determined by the meaning of the provisions of the insurance contract, citing *Mut. Life Ins. Co. vs. Hurni Packing Co.*, 263 U. S. 167, 68 L. Ed. 235, 31 A. L. R. 102. Said the court in that case: 'It was competent for the parties to agree that the effective date of the policy should be one prior to its actual execution or issue and this in our opinion is what they did. . . . There can be no question but that the company could waive any provision of its policies, citing *Knickerbocker L. Ins. Co. vs.*

Norton, 96 U. S. 234, 24 L. Ed. 689, and could accept a promissory note as cash in payment of its premiums.' "

FIRE INSURANCE CO. VS. BUILDING ASSN.,
43 N. J. L. 656-657.

This case has been cited before in this brief, but is again cited as a leading authority against the proposition advanced by appellant that it is the duty of insured to make inquiries as to the authority of the agent. This we say is not true where the agent has been held out as general agent as in this case and in the case at bar. I have found no authority to the effect that inquiry must be made respecting the authority of a state manager or a general manager or a general agent, especially when no limitations upon their authority have been brought home to the insured.

In this case the Court says that in the case of a general agent as distinguished from a special agent no inquiry need be made by the insured into his powers where he has no notice of limitations on said powers, citing *Ins. Co. vs. Wilkinson*, 13 Wall. 222; *Metz vs. Lancaster Fire Ins. Co.*, 79 Pa. St. 476; *Merserau vs. Phoenix Fire Ins. Co.*, 66 N. Y. 274.

INTERSOUTHERN L. INS. CO. VS. HOLZHAUER,
(Ark. 1928), 9 S. W. (2nd) 26.

In this case the Court said:

"Where agents of foreign corporations represent them as general managers or managers they have generally large discretionary powers in regard to making insurance and transacting business relating thereto. Their powers are similar to those of officers of the company. A resident designated officially as manager has authority to employ another to solicit risks, to contract therefor, to deliver policies, and the acts of the agent so appointed, done within the employment, will bind the company."

CRUTCHFIELD VS. UNION CENTRAL L. INS. CO.,
(Ky. 1902), 67 S. W. 67.

In this case the Court said:

"The manager for a foreign corporation in a state in the absence of evidence to the contrary is presumed to have the authority of an executive officer. If there is a limitation of his authority notice thereof must be given to the contracting party in a clear and certain manner."

NATIONAL LIBERTY INSURANCE COMPANY VS. MILLIGAN,
1926 (9th Circuit), 10 Fed. (2nd) 483.

In this case the Court upheld a preliminary oral contract of insurance which the agent said would take effect "right now." The Court said:

"In this class of cases the material question is the extent of the apparent authority of the agent. (I May on Ins. 3rd Ad. 126, and other authorities cited). In I May on Ins., Sec. 126, it is said: 'The authority of an agent must be determined by the nature of the business and is, prima facie, extensive with its

> requirements. His power cannot be limited by special private instructions unless the insured has notice,' etc. . . . In *Union Mutual Life Ins. Co. vs. Wilkinson*, 13 Wall. 222, 20 L. Ed. 617, Mr. Justice Miller says: 'The powers of the (local) agent are prima facie coextensive with the business intrusted to his care and will not be narrowed by limitations not communicated to the person with whom he deals. (Citing cases). There is no evidence of the lack of authority now relied upon by the defendant."

KEMPF VS. EQUITABLE LIFE ASS. OF U. S.,
(Mo.), 184 S. W. 133.

In this case the agent signed a receipt which said that the insurance would take effect upon the date of the application provided he proved a good risk at the home office. The application contained a condition that insurance should not take effect unless policy delivered to insured in good health. Applicant was passed by home office but the premium was raised and a penalty of five years added to his life. The insured committed suicide before the policy as modified was delivered. Court held that a temporary contract of insurance was made and company was liable.

CITIZENS L. INS. CO. VS. COLEMAN,
148 Ky. 750, 147 S. W. 414.

Temporary contract of life insurance upheld on practically the same facts as last case.

32 *Corpus Juris. Life Ins.*, Sec. 44, lays down the rule as follows:

"Where an agreement is made to insure provided a medical examination of the applicant shows that he is in sound bodily health and an insurable risk, a satisfactory medical examination concludes the contract."

"A valid temporary or preliminary contract of insurance may be made orally."

32 *Corpus Juris*, Sec. 184.

"Usually a general agent is held to have and a mere soliciting agent not to have power to enter into a contract of insurance"

32 *Corpus Juris*, pages 1097-1098.

"The preliminary contract is of the greatest importance for if the applicant could not be made secure until all of the formal documents were executed and delivered the beneficial effect of the insurance system would be greatly impaired."

32 *C. J.*, 1100, Sec. 184.

Counsel has cited only two cases to the effect that a manager or general agent cannot make a parol contract of insurance. They are:

PUNTON VS. UNITED STATES LIFE INS. CO.,
(Mo.), 245 S. W. 1080.

Action on insurance contract. Application provided that no waiver could be made except by president or secretary. In this case the plaintiff did not know that the local agent was styled "manager." The sign on the door was "regular agent" and there was no ostensible authority or holding out proved here. Also, on the rehearing, the plaintiff recovered judgment.

CONTINENTAL INS. CO. VS. SCHULMAN,
(Tenn.), 205 S. W. 315.

In this case the agent was not a general agent but a recording agent tho some of the state decisions spoke of such agents as general agents. Such an agent could make an oral contract for fire insurance but only for a few days.

In conclusion, on this branch of the case we have shown by the overwhelming weight of authority that a manager, district manager, general manager or general agent are all considered general agents and that they are regarded as alter egos of the companies they represent. They have unlimited powers with reference to the business intrusted to their hands. They are considered in the light of executive officers of the company and they are generally held to have power to make temporary contracts of insurance and to orally waive conditions and forfeitures. No secret limitations on their powers bind third persons dealing with them without notice and they have ostensible powers commensurate with the business they are handling. Such an agent was Hickman in this case and there is no question but that he had the power to make the oral contract of insurance the jury said he made, but he also had power to waive the conditions precedent appearing in the application.

It was perfectly proper for the trial court to exclude certain questions asked Preston and Hick-

man with reference to the matters excepted to by appellant and set out here as error. Practically all of these questions were conclusions of law or mere opinions on the part of the witnesses and in nearly every instance there was other evidence in the record of the information sought in these questions. For instance, the refusal to permit Preston to answer the question as to whether Hickman was the general agent or manager of defendant's company was not prejudicial error, if error at all, for the reason that the appellant company had introduced the private contract in evidence between Hickman and the company which stated all the limitations upon his authority which they were seeking to bring out by these questions. Also there was already evidence in the record that Dunn had testified that Hickman was only a soliciting agent. (Transcript, page 155).

In view of the pleadings it was certainly immaterial whether the widow of the insured ever had paid the note which was given for the first premium because they admit in their answer that an offer to pay the note was made and refused by the company. (Transcript, page 17).

In the case of *New York Underwriters Fire Ins. Co. vs. Malhamoto*, 25 Fed. (2nd) 915, it was held that excluding evidence that special agent and fire insurance adjuster calling on insured were not defendant's representatives held harmless error where the parties testified to the matter themselves.

Consequently, if there is already evidence in the record of the information sought to be obtained by the witnesses, the rejection of their evidence is harmless error, if it is error at all.

The only other matter we need to touch upon is whether it was error for the court to admit the testimony given by Steven Doutre and Arthur Yelland concerning the fact that Hickman had solicited them for insurance about the same time that he solicited Louis Yelland and that in doing so he had followed the same practice he had used in soliciting Louis Yelland in stating that the insurance would be effective just as soon as they paid the first premium provided they passed satisfactory medical examinations.

We alleged in our complaint that this was the practice of Hickman just as it was alleged in the case of *Mayfield vs. Montana Life Ins. Company*, 205 Pac. 669. (Transcript, pages 2 and 6). And this evidence was introduced to prove the practice alleged in our complaint and was absolutely competent for that purpose.

Cyclopedia of Evidence, Vol. 11, page 795.

The Doutre and Arthur Yelland transaction occurred at the same time the Louis Yelland contract was being consummated. It is true that the Louis Yelland application was taken on the 20th of November, 1926, but he did not take his medical

examination until the 26th of that month and in the meantime Hickman had called on Doutre and Arthur Yelland.

In view of the law that we have cited in the other branches of the case supporting our theory the court committed no error in his instructions. His instructions fully covered appellant's theory of the case and were eminently fair to both sides.

Appellee respectfully requests that this Honorable Court affirm the judgment of the Lower Court with costs.

Respectfully submitted,

W. E. Pettigrew

Attorney for Appellee.